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21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA
23 SAN FRANCISCO DIVISION

24 ORACLE AMERICA, INC.

25 Plaintiff,

26 v.

27 GOOGLE INC.

28 Defendant.

Case No. CV 10-03561 WHA

**ORACLE OBJECTIONS TO THE
DEPOSITION CLIP OF TERRENCE
BARR RE: "TRANSFORMATIVE USE"
THAT GOOGLE INTENDS TO USE IN ITS
OPENING STATEMENT**

Trial: May 9, 2016 at 8:00 a.m.
Dept.: Courtroom 8, 19th Floor
Judge: Honorable William Alsup

1 Oracle objects under Federal Rules of Evidence 402, 403, 602, 701, and 702 to two dep-
2 osition clips that Google intends to use during its opening statement and in its presentation of evi-
3 dence. Specifically, Google seeks to present to the jury testimony from former Oracle employee
4 Terrence Barr that Android “transformed” the mobile industry as evidence that Google’s copying
5 is a transformative use under the first fair use factor. Such testimony is irrelevant and prejudicial.
6 Transformative use has nothing to do with transforming the industry or market in which the new
7 work competes. Rather, transformative use involves transforming the original work to alter its
8 expression, meaning, or message. Similarly, the definition of transformative that Google supplied
9 Mr. Barr in the deposition (“chang[ing] the status quo in a very significant way”) is nowhere near
10 the legal definition of transformative use set out by the Supreme Court, the Federal Circuit in this
11 case, and this Court’s jury instructions. Presentation of evidence assuming an irrelevant defini-
12 tion of transformative use not only lacks any probative value but it risks confusing and misleading
13 the jury and substantially prejudicing Oracle. Oracle therefore objects and seeks to exclude the
14 deposition clips under Rule 103(d) as irrelevant, without foundation, improper opinion testimony,
15 and prejudicial.

16 Terrance Barr is a former employee of Oracle who, at the time of his deposition, held the
17 position of Senior Principal Technologist and Product Manager. In that capacity, Mr. Barr was
18 responsible for certain aspects of Oracle’s Internet of Things product strategy and product man-
19 agement. During his deposition, on December 9, 2015, counsel for Google asked Mr. Barr a
20 series of questions about whether certain smartphones, such as the iPhone and Android, “trans-
21 formed the mobile industry.” Ex. A (Barr Depo.) 137:16-18. Google seeks to play two such clips
22 from that discussion.

23 1. Toward the end of the discussion about transforming the mobile industry, counsel for
24 Google asked Mr. Barr if “Apple’s IOS operating system [is] transformative.” *Id.* at 137:25-
25 138:1. When Mr. Barr sought clarification because “‘Transformative’ is a really vague term, so
26 I’m not sure if I can answer that,” *id.* at 138:3-4, counsel for Google defined transformative as
27 follows: “In other words, did it change the status quo in a very significant way when it came
28 out,” *id.* at 138:6-7. Still discussing Apple’s iOS, Mr. Barr responded: “The status quo of the

1 mobile industry, yes,” *id.* at 138:9-10. Google omits this entire context from its deposition design-
 2 nation.

3 The clip that Google seeks to play immediately follows where Google’s counsel defined
 4 transformative for Mr. Barr as changing the status quo in a significant way:

5 Q. Was Android transformative?

6 [Oracle counsel]: Objection to form.

7 The Witness: I think I already answered that, that I believe in some
 ways, yes.

8 *Id.* at 138:12-15. During the tutorial, Google used this snippet to argue: “Their own witnesses
 9 now admit that Android is transformative. The testimony from Terrence Barr, one of their -- I
 10 think he was actually a 30(b)6: [quoting the above]” 2/24/16 Tr. at 19:22-20:5. (In point of
 11 fact, Mr. Barr was **not** a Rule 30(b)(6) witness.) Google now includes that testimony in its
 12 opening statement slides (Slide 43) and in its deposition designations for trial. Exs. A
 13 (Deposition Designations, Excerpt) & B (Google Op. Slides, Excerpt).

14 This testimony is irrelevant and confusing, and the Court should not permit Google to play
 15 or otherwise display this deposition clip in its opening statement or introduce it as testimony. Mr.
 16 Barr was not testifying about the meaning of transformative use under fair use law; rather, he was
 17 answering a question based on a definition of “transformative” that Google’s counsel supplied has
 18 no foundation in the law and no relevance whatsoever to the transformative use inquiry that the
 19 jury will undertake. This Court in its jury instructions and the Federal Circuit in its decision de-
 20 fined “transformative.” In every instance, transformative use involves transforming *the original*
 21 *work*—not the market in which the work will be sold, nor the industry in which it will compete,
 22 nor the lives of its consumers. The Supreme Court, Federal Circuit, and this Court define trans-
 23 formative use as a use that “adds something new, with a further purpose or different character,
 24 altering the first [work] with new expression, meaning or message.” *Oracle Am., Inc. v. Google*
 25 *Inc.*, 750 F.3d 1339, 1375 (Fed. Cir. 2014) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.
 26 569, 579 (1994); *accord* ECF No. 1828 (Final Pre-Instr.) at 3-4 (proposing definition of trans-
 27 formative use). “A use is considered transformative only where a defendant changes the plain-
 28 tiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the

1 *plaintiff's work is transformed* into a new creation.” *Oracle Am.*, 750 F.3d at 1374 (emphasis
 2 added) (quoting *Perfect10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007));
 3 *accord* ECF No. 1828 at 3-4. “A work is not transformative where the user ‘makes no alteration
 4 to the *expressive content or message* of the original work.’” *Oracle Am.*, 750 F.3d at 1375 (quot-
 5 ing *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013)); *accord* ECF No. 1828 at
 6 3-4. Transformative use has *nothing* to do with transforming *the industry* or *the market* or (as per
 7 Google’s definition in the deposition) “chang[ing] the status quo.” That is not what transforma-
 8 tive use means in the fair use context.

9 Presenting this testimony, moreover, will confuse the issue and potentially mislead the
 10 jury. Indeed, because Mr. Barr’s answer assumes a definition of “transformative” that is legally
 11 inapposite for purposes of fair use, his deposition clip lacks any probative value under Rule 402.
 12 Moreover, Mr. Barr has no legal training, he was not provided any legally relevant definition of
 13 “transformative” for fair use purposes, and his testimony is being used as expert legal opinion
 14 about whether Android is transformative. His testimony therefore lacks foundation under Rule
 15 602 and is being offered as improper opinion testimony under Rules 701 and 702. Finally, be-
 16 cause Google plans to use Mr. Barr’s testimony not only as evidence that Android is “transform-
 17 ative” but also to argue that *Oracle’s witnesses agree* that Android is transformative, this clip of
 18 Mr. Barr’s deposition is highly prejudicial. It is confusing and calculated to mislead the jury into
 19 believing that Android is transformative for purposes of fair use when that is not what the testi-
 20 mony says.

21 2. For similar reasons, Oracle objects to the following clips from Mr. Barr’s deposition
 22 supposedly regarding transformative use that Google plans to use in its opening and as testimony
 23 during the trial. Ex. A (designations), Ex. B (Slides 42-43). Google seeks to offer the following:

24 Q. Do you believe that Android transformed the mobile industry as
 25 well?

26 [Oracle counsel]: Objection to form.

27 The Witness: I think I answered that before. In some ways, yes.

28 Ex. B (Slide 43); Ex. A (Barr Depo.) at 137:19-23.

1 Q. At the time you wrote this blog post, was the mobile industry
2 undergoing a transformation of sorts?

3 A. In my opinion, yes.

4 Q. And Android was an embodiment of that transformation; is that
5 correct?

6 A. Android was part of that transformation. It was part of that
7 overall shift.

8 Ex. B (Slide 42); Ex. A (Barr Depo. at 134:11-19).

9 As with the snippet discussed above, these clips are confusing because each uses “trans-
10 formation” in a way that is completely different from the meaning of transformative use in the
11 context of fair use. “[T]ransform[ing] the mobile industry” and being an “embodiment of th[e]
12 transformation” in “the mobile industry” has nothing to do with transforming Oracle’s work,
13 which is the relevant inquiry for fair use. The clips therefore provide no probative evidence.
14 They are, however, prejudicial to Oracle because they risk confusing and misleading the jury into
15 believing that Android is “transformative” in a way that is, in actuality, not at all relevant to fair
16 use. The risk is especially great here where the questions posed in the clips use the term “trans-
17 formative,” and, if the tutorial is any indication, Google plans to use these clips to argue that
18 Oracle’s employees agree that Android is transformative for fair use purposes. This creates the
19 real risk that the jury may place undue reliance on clips that are contrary to law and contrary to
20 this Court’s and the Federal Circuit’s instructions.

21 Accordingly, Oracle respectfully requests that this Court sustain Oracle’s objection under
22 Rules 402, 403, 602, 701, and 702 and exclude all uses of the above-referenced deposition clips
23 of Mr. Barr from all stages of the trial, including Google’s opening statement.

24 Dated: May 8, 2016

Respectfully submitted,

Orrick, Herrington & Sutcliffe LLP

25 By: /s/ Peter A. Bicks
26 Peter A. Bicks

27 Counsel for ORACLE AMERICA, INC.
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